CITATIONS

Cases:

	Page
Abbott Securities Corp. v. *New York Stock Exchange*, 1974—2 Trade Cases ¶75,324 (D.D.C.)	10
California v. *Federal Power Commission*, 369 U.S. 482	8
Frederickson v. *Merrill Lynch, Pierce, Fenner & Smith*, 1974—2 Trade Cases ¶75,227 (N.D. Ill.)	10
Hughes Tool Co. v. *Trans World Airlines*, 409 U.S. 363	7
Independent Broker-Dealers' Trade Association v. *Securities and Exchange Commission*, 442 F. 2d 132, certiorari denied, 404 U.S. 828	12
Jacobi v. *Bache & Co., Inc.*, 377 F. Supp. 86	10
Kaplan v. *Lehman Bros.*, 371 F. 2d 409, certiorari denied, 389 U.S. 954	10
Merrill Lynch, Pierce, Fenner & Smith v. *Ware*, 414 U.S. 117	2, 12
Otter Tail Power Co. v. *United States*, 410 U.S. 366	8, 11
Pan American World Airways v. *United States*, 371 U.S. 296	7
Ricci v. *Chicago Mercantile Exchange*, 409 U.S. 289	8, 9, 12
Robert W. Stark, Jr., Inc. v. *New York Stock Exchange*, 466 F. 2d 743	10
Silver v. *New York Stock Exchange*, 373 U.S. 341	passim
Thill Securities Corp. v. *New York Stock Exchange*, 433 F. 2d 264, certiorari denied, 401 U.S. 994	10, 12
Thill Securities Corp. v. *New York Stock Exchange*, E.D. Wis., No. 63-C-264, awaiting decision	2, 10
United States v. *Morgan*, 118 F. Supp. 621	5
United States v. *Philadelphia Nat. Bank*, 374 U.S. 321	7, 8
United States v. *Terminal R. Ass'n of St. Louis*, 224 U.S. 383	11

571-477—75——1

Statutes and regulation:

Securities Exchange Act of 1934, 48 Stat. 881, *et seq.*, as amended, 15 U.S.C. 78a *et seq* — Page 1, 3, 6, 11
- Section 3(a)(3), 15 U.S.C. 78c(a)(3) — 3
- Section 6(b), 15 U.S.C. 78f(b) — 3
- Section 6(d), 15 U.S.C. 78f(d) — 3
- Section 15A(b)(7), 15 U.S.C. 78o–3(b)(7) — 4
- Section 19(b), 15 U.S.C. 78s(b) — 2, 3, 5, 8, 9, 11
- Section 19(b)(8), 15 U.S.C. 78s(b)(8) — 9
- Section 19(b)(9), 15 U.S.C. 78s(b)(9) — 2, 3, 4, 6, 8
- Section 28, 15 U.S.C. 78bb — 3

Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, *et seq* — 3, 4, 5, 6, 10, 11
- Section 1, 15 U.S.C. 1 — 1

17 C.F.R. 19b–3 — 3

Miscellaneous:

The Special Study of Securities Markets, H. Doc. No. 95, 88th Cong., 1st Sess — 6

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-304

RICHARD A. GORDON, ET. AL., PETITIONER

v.

NEW YORK STOCK EXCHANGE, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

---

1. The sole issue in this case is how a district court considering a private antitrust suit challenging the legality under Section 1 of the Sherman Act of stock exchange rules fixing commission rates is to determine whether the Securities Exchange Act, implies immunity from the Sherman Act for such practices. The answer to that question depends on whether there is an irreconcilable conflict between the requirements of the 1934 Act and the Sherman Act, as applied to the particular rules being challenged. This, in turn, depends on whether, under the test of *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 357, the practices challenged are "necessary to make the Securities Exchange Act work." Contrary to respondents' conten-

tions, therefore, the justification for the fixing of commission rates is directly relevant to the resolution of the question of immunity.

The determination whether there is an implied exemption from the antitrust laws, be it for an entire industry or for particular practices subject to regulation, is a function traditionally performed by antitrust courts. *Silver* contemplates a particularized inquiry designed to reconcile the statutory schemes without holding one or the other completely ousted. *Id.* at 357.[1] *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware,* 414 U.S. 117, 127. Thus, *Silver* does not support respondents' theory that the effect of Section 19 (b) of the Securities Exchange Act, on its face, is to oust the antitrust courts of jurisdiction to determine the need for exchange commission rate fixing as a basis for antitrust immunity.

2. Respondents and the SEC assume, mistakenly, that Section 19(b)(9) of the 1934 Act "sanctions" or "authorizes" exchange price fixing, and that any price fixing rule is *ipso facto* exempt from the antitrust laws. But that section does not say or imply this. It does not authorize exchanges to do anything. It provides only that exchange rules fixing commission rates are subject to being altered or supplemented by the SEC. Section 19(b) merely gives the Commission an additional remedy to use in case the exchanges act

---

[1] Such an inquiry ordinarily requires a full trial, although in particular cases where no material issues of fact are disputed—as in *Silver*—summary judgment is appropriate. Such a trial has now been completed, with participation of both the United States and the SEC as intervenors, in *Thill Securities Corp* v. *New York Stock Exchange*, E.D. Wis., No. 63–C–264.

improperly in exercising their powers of self-regulation under Section 6(b) and (d) of the Act.

If Section 19(b)(9) "sanctioned" price fixing, the SEC could not abolish fixed commissions, as it recently has done (SEC Doc. App. 109). Thus, Section 19(b) itself does not repeal the antitrust laws in their application to the securities industry; it would do so only to the extent that there is a particularized conflict between those laws and the statutory scheme of the Securities Exchange Act, as required by *Silver*. This is confirmed by the language of Section 28 (15 U.S.C. 78bb) that "[t]he rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity."[2]

The effect of Section 19(b)(9), when construed in the light of Section 28 and *Silver* v. *New York Stock Exchange, supra,* is to create a possible defense to what would *otherwise* be an unlawful practice embodied in exchange rules. This defense is based upon the necessities of collective self-regulation required by the 1934 Act. Section 19(b)(9) also confers powers on the SEC to alter or abolish such practices by administrative means, without awaiting a court determination

[2] For the same reason, the definition of exchange member contained in Section 3(a)(3) of the Act (15 U.S.C. 78c(a)(3)) does not reflect an intention to authorize exchange rate fixing and immunize it from the Sherman Act. It indicates only that exchange members may be granted a professional discount not available to the general public. Such discounts do not require uniform fixed rates. If Section 3(a)(3) required fixed commissions, the power of the SEC to abolish them, as exercised in its new Rule 19b-3, 17 C.F.R. 19b-3, would be in doubt (SEC Doc. App. 155-156).

under the Sherman Act; or, upon a proper finding of unavoidable necessity, to require them.

The limited role of Section 19(b)(9)—it merely provides an antitrust defense and a basis for independent administrative power, but does not automatically declare any antitrust immunity—is underlined by contrasting it with the prohibition against price fixing rules by associations of securities dealers, as set forth in Section 15A(b)(7) of the Securities Exchange Act (15 U.S.C. 78*o*–3(b)(7) (the Maloney Act). In that provision, Congress declared that the fixing of commissions by dealer associations in the over-the-counter market would violate the securities laws. Thus, if such restraints were adopted by a dealer's association and then challenged under the Sherman Act, the associations could not defend on the ground that such price fixing was necessary to make the Maloney Act work.

Such a defense remains open, however, with respect to exchange price fixing, because of Section 19(b)(9). Moreover, Section 15A(b)(7) bars the SEC from ever requiring fixed commission rates in the over-the-counter market, no matter how strong the necessity therefor may be. On the other hand, upon a proper finding, the SEC may order the exchanges to fix commission rates under Section 19(b)(9).

3. In determining the legality under the Sherman Act of exchange rate fixing, *Silver* and Section 19(b)(9) require that it first be decided whether such price fixing is necessary to make the Exchange Act work. If it is necessary, that is the end of the matter, since under *Silver* the price fixing would then be exempt from the prohibitions of the Sherman Act. If, how-

ever, the price fixing is not necessary to accomplish that objective, then it is illegal *per se* under the usual rules governing price fixing.

The issue before the Court, however, is not the legality of such price fixing, but whether the district court is the proper forum to apply the *Silver* test. Respondents' argument that Congres would not have referred to the fixing of commission rates in Section 19(b) if it had considered the practice to be "illegal" thus misses the mark, since the legality of that practice depends upon the result of applying the *Silver* test.

For the same reason, the pendency of current legislative proposals to abolish exchange price fixing does not indicate any Congressional views as to the legality of the practice under current law. Such legislation is based upon its proponents' views of desirable economic policy in the light of recent legislative reviews. Such proposals declare nothing about the legality, under existing law, of exchange price fixing. Rather, the need for testing legality under *Silver* has been recognized in underlying legislative studies.[3]

The legislative history exhaustively reviewed by the *amici* and the respondents shows no consideration of the relationship between the Sherman Act and the price fixing practices of securities exchanges. Until 1934, no one had attempted to apply the Sherman Act to the exchanges. Indeed, not until the filing in 1947 of the complaint in *United States* v. *Morgan,* 118 F. Supp. 621 (S.D.N.Y.) did the United States attempt to apply the Sherman Act to the securities in-

[3] See U.S. Br., pp. 43–44 n. 25.

dustry.[4] Close attention to antitrust aspects of exchange price fixing did not begin until after the Commission's *Special Study of Securities Markets,* H. Doc. No. 95, 88th Cong., 1st Sess., in 1963; and the decision in *Silver* itself.

4. All agree that the SEC has specific reserved powers of oversight with respect to price fixing rules initially adopted by the exchanges. But the mere existence of these powers does not create an irreconcilable conflict with the Sherman Act. Such a clash between the two statutory schemes would exist only if the particular practices in issue are themselves essential to the purposes of the 1934 Act.

The SEC, despite its conceded powers under Section 19(b)(9), has never so found. At most, it tolerated exchange price fixing rules until September 1973, when it announced its intention to terminate them by May 1, 1975 (SEC Doc. App. 27). Antitrust suits testing exchange price fixing rules under *Silver,* therefore, are not a form of collateral review of action by the SEC; for it is the exchange's rule, not the SEC's acquiescence, whose validity is in issue.

[4] In that case, the United States alleged a conspiracy in restraint of trade and monopolization by 17 investment bankers in connection with the underwriting of securities. The case was thus addressed to the primary market for newly issued securities, not the secondary exchange market for outstanding securities. The district court held that the government failed to prove its allegations. Significantly, however, it also expressly declared that neither the provisions of the Securities Act of 1933 nor the Securities Exchange Act of 1934 created an implied exemption in whole or in part from the Sherman Act. *Id.* at 697.

Although the SEC recently began, as a result of its own investigations, to take steps looking toward the gradual abolition of the practice, the only justification it has ever advanced for continuance of fixed rate schedules is the need for a transition period to prevent disruption when the market is finally opened to competition. A requirement that there be a transition period is not the equivalent of a reasoned administrative determination that exchange price fixing is necessary to the scheme of the 1934 Act, although a Commission finding of a need for such a transition may affect relief. (See U.S. Br., p. 54.)

Moreover, this Court has never held the antitrust laws inapplicable merely because an agency had jurisdiction over the subject matter of the antitrust suit. It has required for antitrust immunity a "plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia Nat. Bank,* 374 U.S. 321, 351. Respondents and the SEC, however, rely upon an alleged repugnancy which is not plain on the face of the statute; and they would preclude the lower courts from developing a factual record to determine whether this case presents a particular and discrete instance of a conflict.

Neither *Pan American World Airways* v. *United States,* 371 U.S. 296, or *Hughes Tool Co.* v. *Trans World Airlines,* 409 U.S. 363, supports their position. In those cases, the "Civil Aeronautics Board had been given broad powers to enforce the competitive standard clearly delineated by the Civil Aeronautics Act, and to immunize a variety of transactions from the operation of the antitrust laws, the Sherman

Act * * *." For those reasons, "the Sherman Act could not be applied to facts composing the precise ingredients of a case subject to the Board's broad regulatory and remedial powers * * * " (*Philadelphia Nat. Bank, supra,* 374 U.S. at 351). Here, unlike the Civil Aeronautics Act, the statute contains no provision for immunity, and the Commission's role is secondary to the initial business judgments of the exchanges.

In such circumstances, the antitrust laws continue to apply, absent the specific conflict contemplated by *Silver.* See *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 374. Respondents' contrary contentions are inconsistent with cases involving regulatory jurisdiction over activities affecting competition, such as mergers or access to commodities markets, in which the Court has held that antitrust jurisdiction is not ousted by overlapping regulatory responsibility. See *e.g., Philadelphia Nat. Bank, supra; California* v. *Federal Power Commission,* 369 U.S. 482; *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289, 302 n. 13.

5. Respondents and the SEC contend that an irreconcilable conflict exists between the Sherman Act and Section 19(b)(9) of the Securities Exchange Act because the mere possibility that exchange rules subject to SEC oversight under Section 19(b), may be challenged in an antitrust court, would have a "chilling effect" upon the exchanges' performance of the function of self-regulation. The argument is legally unsound, and it attributes exaggerated adverse consequences to the *Silver* rule.

A. As we have shown in our main brief (U.S. Br., p. 55), in *Silver* this Court rejected the Second Cir-

cuit's analysis—reiterated here by respondents and the SEC—that the mere possibility of antitrust liability will paralyze the exchanges' will to carry out their duty of self-regulation. Moreover, although the SEC had no direct authority to review the enforcement against Mr. Silver of the exchange rules involved in his case, the Court assumed that the SEC had express power under Section 19(b) to define the same requirements of fair procedure whose absence from the exchange's rule was the basis of antitrust liability in that case. Thus, if the complaint had been framed as a direct attack on the exchange rule under which Mr. Silver's ticker and telephone service was terminated, the same result would have obtained. See 373 U.S. at 364 n. 16.[5] *Silver* therefore defines a legal standard which is equally applicable to this case. Accord, *Ricci* v. *Chicago Mercantile Exchange, supra.*

B. The "chilling effect" argument rests upon the SEC's claim that "hundreds" of antitrust courts (SEC Br., p. 82) will be weighing exchange rules under the necessity test, in constant and multiplicitous streams of litigation (SEC Br., pp. 46–51). These courts, it is argued, will reach results inconsistent with the SEC's policy determinations, and with each other, casting a pall of uncertainty over the entire process of supervised self-regulation contemplated by the Act.

Silver has produced no such calamity.

---

[5] The Court's assumption is supported by Section 19(b)(8), which expressly gives the Commission power over rules relating to the reporting of transactions and ticker service. 15 U.S.C. 78s (b)(8).

Almost all actual Sherman Act litigation that might involve the *Silver* test has concerned rules and regulations which center around the protection of the exchanges' system of price fixing: *i.e.,* rules against sharing commissions with non-members; rules allocating discounts among various classes; or rules denying access to the exchange on equal terms with members.[6] The Commission's recent determination that exchange price fixing should be terminated (SEC Doc. App. 109) will eliminate the principal factor that has engendered most of this litigation. The few remaining occasions for litigation can be definitively resolved with the aid of the SEC as *amicus curiae;* as an intervenor, as in the fully tried *Thill* case[7] (see U.S. Br., pp. 25–26 n. 10); or under the primary jurisdiction doctrine, if applicable—and under the guidance of the *Silver* test itself.

On the other hand, the possibility that exchange rules may be tested under *Silver* in a Sherman Act suit will have a salutary effect upon the exchanges' exercise of their duty of self-regulation. They will be stimulated to scrutinize closely any rules involving seriously anticompetitive consequences, in order to

[6] See, *e.g., Thill Securities Corp.* v. *New York Stock Exchange*, 433 F. 2d 264 (C.A. 7), certiorari denied, 401 U.S. 994; *Kaplan* v. *Lehman Bros.*, 371 F. 2d 409 (C.A. 7), certiorari denied, 389 U.S. 954; *Frederickson* v. *Merrill Lynch, Pierce, Fenner & Smith*, 1974–2 Trade Cases ¶75,227 (N.D. Ill.); *Abbott Securities Corp.* v. *New York Stock Exchange*, 1974–2 Trade Cases ¶75,324 (D. D.C.); *Jacobi* v. *Bache & Co., Inc.*, 377 F. Supp. 86, 97 (S.D.N.Y.); cf. *Robert W. Stark, Jr., Inc.* v. *New York Stock Exchange*, 466 F. 2d 7413 (C.A. 2).

[7] *Thill* v. *New York Stock Exchange*, E.D. Wisc. No. 63–C–264, awaiting decision.

be certain that such restrictions are essential to the purposes of the Securities Exchange Act. The SEC itself will benefit, because this heightened attention to the Act's requirements by the exchanges, and its attendant minimization of practices which do not benefit investors, will reduce the need for regulatory intervention by the SEC itself. Far from having a chilling effect, therefore, continued application of the Sherman Act as determined under the *Silver* test will complement the system of self-regulation under reserved SEC supervision which the 1934 Act contemplates.

Nor is there any danger that the coexistence of the two statutory schemes will prevent the SEC from reinstituting some form of fixed rates, if "unforeseen developments" make this necessary (SEC Doc. App. 136–137). Presumably such a decision would be accompanied by an articulated and reasoned explanation that will satisfy *Silver*'s necessity test, and thus foreclose antitrust liability. Moreover, any antitrust decrees dealing with the subject can make provision for conflicting SEC requirements, as was done in *Otter Tail Power Co.* v. *United States,* 410 U.S. at 375; *United States* v. *Terminal R. Ass'n of St. Louis,* 224 U.S. 383, 412 (U.S. Br., p. 48).

Respondents and the SEC would so limit *Silver* that the public would have no remedy against anticompetitive exchange rules which exceed the necessities of the 1934 Act, except to complain to the Commission. The procedure under Section 19(b) does not require the Commission to explain its reasons for re-

jecting a complaint, and the judicial reviewability of such rejection is uncertain.

The organization represented by petitioner in this case sought review of Commission acquiescence in exchange proposals on two occasions, only to be told by the Commission that it had not approved anything and that its "non-objection" to exchange proposals was not reviewable agency action. The Commission's apparent change of position in this respect[8] (SEC Br., pp. 38–39 n. 45) is qualified by a large reservation (that review is available "under appropriate circumstances") whose meaning is uncertain. It does not assure any judicial review under the *Silver* test.

In contrast, the availability of an antitrust remedy subject to the *Silver* test provides a full opportunity for the SEC to present arguments based on regulatory necessity, as it did in *Thill, supra;* provides injured members of the public with an effective method for challenging anticompetitive rules; and provides the exchanges with an effective forum for establishing their justifications. Respondents' attempt to undermine the salutary principle of *Silver* should be rejected. See, *e.g., Ricci* v. *Chicago Mercantile Exchange, supra; Merrill Lynch, Pierce, Fenner & Smith* v. *Ware, supra.*

---

[8] *I.e.*, SEC's acquiescence in the rule of *Independent Broker-Dealers' Trade Association* v. *Securities and Exchange Commission*, 442 F. 2d 132, 141–143, certiorari denied, 404 U.S. 828, and repudiation of its successful motions to dismiss suits for review in *Independent Investor Protective League* v. *Securities and Exchange Commission*, C.A. 2, No. 71–1924; and *Independent Investor Protective League* v. *Securities and Exchange Commission*, D. DC., No. 71–1984.

For the reasons stated in our main brief, and this reply brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.

U.S. GOVERNMENT PRINTING OFFICE: 1975